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Letter dated 31 August 2018 from the Permanent Representative of the Netherlands to the United Nations addressed to the President of the Security Council

I have the honour to transmit herewith the outcome document of the Arria-formula meeting of the Security Council on achievements, challenges and synergies in the relationship between the Council and the International Criminal Court, held on 6 July 2018 (see annex I).

I should be grateful if you would have the present letter and its annexes circulated as a document of the Security Council.

(*Signed*) Karel J.G. **van Oosterom**
Ambassador
Permanent Representative

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Annex I to the letter dated 31 August 2018 from the Permanent Representative of the Netherlands to the United Nations addressed to the President of the Security Council

Takeaways of the Arria-formula meeting of the Security Council on achievements, challenges and synergies in the relationship between the Council and the International Criminal Court, held on 6 July 2018

1. An Arria-formula meeting was held on 6 July 2018, on the topic of achievements, challenges and synergies in the relationship between the Security Council and the International Criminal Court. The meeting was co-hosted by Bolivia (Plurinational State of), Côte d'Ivoire, France, the Netherlands, Peru, Poland, Sweden and the United Kingdom of Great Britain and Northern Ireland. Briefings were provided by the Prosecutor of the International Criminal Court, Fatou Bensouda , the Special Prosecutor of the Special Criminal Court of the Central African Republic, Toussaint Muntazini Mukimapa , the Permanent Representative of Mali to the United Nations, Issa Konfourou , the Assistant Secretary-General for Legal Affairs, Stephen Mathias , and the President of the Assembly of States Parties to the Rome Statute of the International Criminal Court, O Gon Kwon, provided briefings. Representatives of Council members, other Member States and non-governmental organizations present at the meeting also took the floor.

2. The Arria-formula meeting, chaired by the Permanent Representative of the Netherlands to the United Nations, was focused on possible ways to strengthen interaction and cooperation between the Security Council and the International Criminal Court and, in particular, the Office of the Prosecutor. Through its work in investigating and prosecuting atrocity crimes, the Office, as the driving force of the Court, continues to play an important role in the overall international criminal justice system, demonstrating that international accountability may contribute to the prevention of mass atrocities and to the maintenance of international peace and security. Without justice for atrocity crimes, sustainable peace will be an elusive goal; and without peace, impunity is bound to continue.

3. The present document is a compilation of the ideas raised at the Arria-formula meeting with regard to strengthening interaction and cooperation between the Council and the Court. It does not necessarily represent an endorsement of certain views and proposals.

How the judicial mandate of the International Criminal Court to ensure accountability for mass atrocities might help the Security Council to fulfil its mandate to uphold the rule of law

- There are a number of issues that are of mutual concern to both the Security Council and the International Criminal Court. The serious crimes that the Court deals with threaten the peace, security and well-being of the world. The objective of the Rome Statute is to ensure the effective prosecution of such crimes at the national level or, when national jurisdictions are unable or unwilling to do so, at the Court level, thereby putting an end to impunity and thereby contributing to the prevention of further crimes and laying the foundation for sustainable peace. The Council should look into ways to further develop the relationship with the Court with regard to such topics as mass killings, sexual and gender-based crimes, children in armed conflict, attacks against peacekeepers and attacks against cultural property.

- Court representatives should be invited more frequently to participate in sessions where relevant discussions are taking place regarding the thematic issues outlined above or in other matters that are deemed appropriate, where the Court's expertise and experience, as well as greater awareness of its activities, may bring added value to the discussions and complex matters before the Council.
- The preliminary examination work of the Office of the Prosecutor may serve as a catalyst for States to fulfil their primary obligations under the Rome Statute, while also serving to identify gaps, obstacles and constraints hampering national proceedings.
- Working relations should continue to be established and expertise shared with United Nations ad-hoc tribunals and specialized courts. The Court can contribute to closing the impunity gap through collaborative international and regional networks and efforts.

Possible ways to strengthen interaction and cooperation between the Security Council and the International Criminal Court

- Support and continue to support cooperation between the Office of the Prosecutor and United Nations entities, under the umbrella of the relationship agreement between the Organization and the Court. The Court is helping to ensure stability in a number of situations and has a central role in many other situations. Encourage the signing of specific memorandums of understanding with field missions or peacekeeping operations for the purposes of, inter alia, exchanging information of a contextual or crime-related nature and logistical assistance.
- Strengthen the mandates of peacekeeping missions and provide a clear and comprehensive basis for legal cooperation, including in particular with regard to the collection and preservation of information to be used as evidence in future criminal proceedings.
- Consider harmonizing the designation criteria of sanctions mechanisms for the identification and freezing of assets. Consideration could also be given to enabling the automatic listing of persons sought by the Court once an arrest warrant has been issued. Encourage the exchange of information, arrest warrants and assistance with regard to arrests themselves between sanctions committees and the Court.
- While the primary responsibility to investigate crimes against peacekeepers lies with national courts, the International Criminal Court might also have jurisdiction over such crimes.
- Call on States to arrest and surrender suspects wanted by the Court.
- Continue to refer situations to the Court under Chapter VII of the Charter of the United Nations if the situation amounts to a threat to international peace and security.
- With regard to referrals, stipulate precisely the obligations of States, as well as the source and amount of funding for the investigation and ways to proceed in cases of non-compliance, in order to achieve the best results from such referrals. Address any lack of response or failure to take concrete action on official Court communications in findings of non-compliance, for example, by establishing an institutional framework to discuss follow-up on the referrals or by developing guidelines to help the Security Council deal with non-compliance decisions using the arsenal of measures available in the Council's toolkit.

- The failure of States to implement Court chamber decisions taken pursuant to Security Council referrals damages the credibility of both institutions. Against that backdrop, it is important to recall the guidance issued by the Secretary-General on contacts with persons who are the subject of arrest warrants or summonses issued by the Court (A/67/828–S/2013/210, annex), which can serve as a basis for a more comprehensive and consistent approach taken by both the Security Council and States parties to the Rome Statute.
- Call on all States Members of the United Nations to sign and ratify the Rome Statute.
- Facilitate funding in relation to the two existing referrals and any future referrals under article 115 (b) of the Rome Statute, subject to the approval of the General Assembly.
- Designate a focal point or permanent mechanism for interaction between the Council and Court outside of the biannual reporting period for the referred situations.
- Bolster the principle of complementarity. National courts are primarily responsible for prosecuting cases of atrocity crimes. Continue to support initiatives that enhance States' ability to administer justice. Continue to task peacekeeping missions with establishing rule of law or set up a special court, as was done in the Central African Republic.
- Consider whether the frequency of reports and briefings of the Court Prosecutor on the situations that have been referred to the Court could be reduced.
- Given the entry into force, on 17 July 2018, of the jurisdiction of the Court over the crime of aggression, consideration could be given to referring to the Court situations where that crime has been committed.

Annex II to the letter dated 31 August 2018 from the Permanent Representative of the Netherlands to the United Nations addressed to the President of the Security Council

Concept note for the Arria-formula meeting on achievements, challenges and synergies in the relationship between the Council and the International Criminal Court, held on 6 July 2018

I. Introduction

"No peace without justice and no justice without peace" best captures the relationship between the United Nations Security Council and the International Criminal Court ("ICC" or "the Court"). This slogan which continues to resonate throughout the world today, simply means that without justice for atrocity crimes, sustainable peace will be an elusive goal; and without peace, impunity is bound to continue. The slogan aptly defines the respective different but interlinked mandates of both institutions: the pursuit of justice by the one and the pursuit of international peace and security by the other.

Over the years, the United Nations Security Council ("UNSC" or "Council") has come to accept that ending the climate of impunity is essential if a society is to come to terms with past abuses and if future abuses are to be prevented. The discourse and practice of the Council in the last 25 years show a general agreement that promoting accountability for international crimes is an important tool at the Council's disposal in discharging its primary responsibility for the maintenance of international peace and security. Accountability is an integral feature of the Council's work on country-specific issues and the UNSC has also regularly acknowledged the relevance of accountability in its discussions on thematic issues, such as protection of civilians, children in and affected by armed conflict, conflict-related sexual violence and protection of cultural heritage. Furthermore, the Council has taken concrete steps to facilitate individual accountability for atrocity crimes, for example through the establishment of the UN ad hoc criminal tribunals for the former Yugoslavia and Rwanda, and through referrals of the situation in Darfur in accordance with UNSC resolution 1593 (2005) and in Libya, in accordance with UNSC resolution 1970 (2011), to the Prosecutor of the ICC, as envisaged by article 13 (b) of the Rome Statute.

The Security Council held its first thematic open debate focusing on the ICC in October 2012, during which several calls were made for the Council to improve its interaction and cooperation with the ICC. Notably, the Council was called upon to effectively follow-up its article 13(b) referrals to ensure its own credibility and the effectiveness of international criminal justice system, in particular through cooperation with the ICC including the timely implementation of ICC decisions.

More generally, the "peace goal" enshrined in Sustainable Development Goal 16 (SDG16: "Peace, Justice and Strong Institutions") recognizes that "there can be no sustainable development without peace and no peace without sustainable development". Equally, recent calls for "just security" in global governance seek to ensure that neither justice nor security imperatives are neglected as the world grapples with critical issues including the growing mass violence in fragile states.

Today, with more experience and lessons learned, and on the eve of the 20th anniversary of the adoption of the Rome Statute in July 2018, it is time to further reflect on the interaction and cooperation between the Council and the Court and in particular, the Court's Prosecutor. Through its work in investigating and prosecuting atrocity crimes, the Office of the Prosecutor as the driving engine of the ICC

continues to play an important role in the overall international criminal justice system, demonstrating that international accountability may contribute to preventing mass atrocities and to the maintenance of international peace and security.

II. Objective

The Arria-formula meeting is a follow up to the first open debate on ICC held at the Council six years ago. Its purpose is to take stock of work of the ICC, its achievements and challenges and to explore possible areas of, and synergies with the work of the UNSC. Amongst others, the discussions could focus on how ICC's judicial mandate of ensuring accountability for mass atrocities may contribute to the Council's mandate to uphold the rule of law, and maintain peace and security. At the same time, Council members may also reflect on means and ways to strengthen the cooperation between the Council and the ICC, notably with the Office of the Prosecutor.

III. Issues for discussion

Member States could consider addressing the following questions in their statements:

- How can the ICC, with full respect for its independent mandate, work with the Council to contribute towards shared objectives such as the establishment of the rule of law, as a key component of obtaining sustainable peace and security?
- How can the Council promote more effectively international justice and the need to prosecute atrocity crimes as an aspect of peace and security discussions, including during thematic debates such as curbing sexual and gender-based crimes, crimes against children and their protection during armed conflicts, protection of cultural heritage, and migration related crimes?
- How can the Council exercise its powers of referral effectively and responsibly, for example through defining a protocol to follow when considering and deciding on referrals?
- Could pre-defined mechanisms and/or protocols regarding the follow-up of such Council referrals to the ICC be conducive to the effective functioning of both the Council and the Court (as an example, a procedure to apply in the occasion of possible non-compliance decisions issued by the ICC)?
- Cooperation between the United Nations and the ICC is reflected upon in article 3 of the Relationship Agreement between the United Nations and the ICC. According to article 86 of the Rome Statute, States Parties shall cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. Since the Court has limited enforcement resources, it relies on the coo[illegible]ration and assistance of States as well as international and regional organizations and other entities. Member States may reflect on how the Security Council could encourage and enhance the cooperation of States and international and regional organizations with the Court.
- Member States may also reflect on how the ICC could serve as a catalyst to advance international criminal justice as a whole, noting in this regard the importance of strengthening mechanisms and capacity to investigate and prosecute such crimes at the domestic level, thus contributing to the advancement of the rule of law by closing any impunity gaps, and to the long-term sustainable development.

IV. Briefers

- Ms. Fatou Bensouda, Prosecutor, International Criminal Court
- Mr. Stephen Mathias, Assistant Secretary-General for Legal Affairs
- Mr. Issa Konfourou, Permanent Representative of Mali to the United Nations in New York
- Mr. Toussaint Muntazini Mukimapa, Special Prosecutor, Special Criminal Court of the Central African Republic
- Mr. O-Gon Kwon, President of the Assembly of States Parties